U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 0 4 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner, a seller of women's apparel, filed its Form I-140, Immigrant Petition for Alien Worker, on June 22, 2012. It seeks to permanently employ the beneficiary in the United States as a market research analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

In his decision, dated June 26, 2012, the Director ruled that the ETA Form 9089 did not demonstrate that the job requires a professional holding an advanced degree or a baccalaureate degree and five years of progressively responsible experience because it stated the following at Part H, item 14: "Master's degree of Business or Master's degree in Marketing or its equivalent based on any suitable combination of education, training or experience determined by a qualified evaluation service required." Under this formulation, the Director observed, the labor certification allows for experience to substitute for the degree requirements of an advanced degree professional. Since the ETA Form 9089 does not require either a master's degree or a bachelor's degree, the Director concluded, it does not support the requested classification of advanced degree professional.

The petitioner filed a timely appeal, accompanied by a brief from counsel and supporting documentation. Among the materials submitted on appeal is an amended Form I-140 requesting that the proffered position be re-classified as a skilled worker. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

When determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834.

USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the ETA Form 9089 at issue in this proceeding, the petitioner specified the following educational, training, and experience requirements for the job of market research analyst:

- *Either*, a master's degree in business administration or marketing or a "foreign educational equivalent" and five years of experience as a marketing director (Part H, lines 4, 4-B, and 9, 10, 10-A, and 10-B).

- *Or*, a bachelor's degree in one of those fields, or a "foreign educational equivalent," and 5 years of progressive experience (Part H, lines 8, 8-C, and 9).

- *Alternatively*, "any suitable combination of education, training or experience determined by a qualified evaluation service" to be equivalent to a master's degree in business administration or marketing (Part H, box 14).

The plain language in box 14 makes clear that the beneficiary could fulfill the educational requirement for the proffered position without a master's degree, or even a bachelor's degree. "Any suitable combination of education, training, or experience" could consist of less than baccalaureate level education, or no educational component at all, as long as a "qualified evaluation service" finds that the beneficiary's training and experience, and whatever education he or she might have, is equivalent to a master's degree in business administration or marketing. Since the ETA Form 9089 does not require a master's degree or a bachelor's degree to qualify for the job, the AAO agrees with the Director that it does not support the petitioner's request on the Form I-140 that the beneficiary be classified as an advanced degree professional. Accordingly, the petition cannot be approved.

Even if no entry had been made in Part H, box 14, of the ETA Form 9089, the beneficiary would not qualify for the proffered position under the remaining terms of the labor certification. Without the "any suitable combination" language of box 14, the labor certification would require either a master's degree in business administration or marketing or a bachelor's degree in one of those fields. The beneficiary, however, does not have any degree in the field of business administration or marketing. As documented by his graduation certificate and academic record, the beneficiary received a bachelor of law degree from [redacted] in Seoul, South Korea, on February 23, 1990, upon completion of a four-year course of study in the university's college of law. A bachelor's degree in the field of law does not meet the labor certification's requirement of a degree in the field of business administration or marketing. For this reason as well, the petition cannot be approved.

In the appeal brief counsel contends that the beneficiary is eligible for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act and the terms of the labor certification. Counsel submits an amended Form I-140 petition, requesting classification of the beneficiary as a skilled worker (requiring at least two years of specialized training or experience), instead of as an advanced degree professional. Counsel's request to amend the original petition cannot be granted. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r

1988). On the original Form I-140, filed on June 22, 2012, the petitioner indicated at Part 2.d. that the petition was being filed for "[a] member of the professions holding an advanced degree." The option of filing the petition for a "skilled worker" (Part 2.f.) was not checked. The petitioner cannot change the requested visa classification during the proceeding to remedy a mismatched labor certification that does not require an advanced degree.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

For all of the reasons discussed above, the petition cannot be approved. Therefore, the Director's denial of the petition will be affirmed, and the appeal dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.